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No. 843

# In the Supreme Court of the United States

OCTOBER TERM, 1945

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER

*v.*

W. J. HOWEY COMPANY AND HOWEY-IN-THE-HILLS SERVICE, INC.

## BRIEF IN BEHALF OF RESPONDENTS ON PETITION FOR CERTIORARI

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# In the Supreme Court of the United States

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SECURITIES AND EXCHANGE COMMISSION, PETITIONER

*v.*

W. J. HOWEY COMPANY AND HOWEY-IN-THE-HILLS SERVICE, INC.

## BRIEF IN BEHALF OF RESPONDENTS ON PETITION FOR CERTIORARI

As indicated in the Opinion of the District Judge (R. 103), 60 Fed. Supp. 440: "There is no controversy with respect to the facts in this case. The parties, by written stipulation * * * have agreed upon the principal facts. In addition, the parties offered oral and documentary evidence at a Hearing subsequently held at the direction of the Court for the purpose of supplying certain additional information desired by the Court."

If the inferences drawn by the District Judge are supported by the proofs, the Plaintiff Commission failed to maintain its complaint.

The issue to be determined is concisely and accurately defined in the pleadings. The answer contained in a single paragraph, says: "The defendants are without knowledge that the plaintiff has ever determined that defendants are engaged or about to engage in acts and practices which constitute or will constitute violations of any provision of the Securities Act of 1933, and on the contrary allege the fact to be that the plaintiff and defendants have agreed to submit for determination of this Court the question as to whether the business conducted by the defendants is subject to the said Act upon a Stipulation, which Stipulation has been entered into between plaintiff and defendants, and is ready to be filed with this Answer. And these defendants say that they are advised and believe and upon information and belief allege the fact to be that their business is not subject to the said Act. And these defendants say it is untrue that on or prior to January 1, 1936, or at any other time, defendants have been selling securities as in Paragraph "3" of the Complaint alleged, and it is untrue that in the sale of securities defendants have been or are now directly or indirectly using the mails or means or instruments of transportation or communication, or directly or indirectly carrying or causing to be carried securities for the purpose of sale or delivery after sale, as in said paragraph "3" alleged. And it is untrue that these defendants, or either of them, has any purpose so to do."

The Howey Company is the owner of large tracts of land in Lake County, Florida, which it is now and for more than twenty years has been planting to citrus trees and selling at various stages of development after

the trees have reached one year old or older, the price varying according to the number of years the land has been planted to citrus trees. (R. 95)

The Service Company is now and since its organization in 1932 has been engaged in the business of cultivating and caring for citrus groves. (R. 95)

Reduced to simple terms, the question to be determined is whether the transactions carried on by the Howey Company and the Service Company, which share the same offices and are directed by common control, utilizing the same facilities and personnel, bring the business of the companies within the control of the Securities and Exchange Commission. The form of the transaction is of little consequence if in fact the transactions carried on are in substance a marketing of securities. If in fact the transactions carried on are not in substance a marketing of securities, the Commission is without jurisdiction. (320 U. S. 351)

Nor is there occasion for going beyond the authoritative exposition of the statute set forth in the opinion of this Court, handed down November 22, 1943, and reported in 320 U. S. 344 under the title of "Securities and Exchange Commission, vs. C. M. Joiner Leasing Corporation, et al." from which we quote:

"In the Securities Act, the term "security" was defined to include by name or description many documents in which there is common trading for specula-

tion or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as "transferable share", "investment contract", and "in general any interest or instrument commonly known as a security" * * * (others) "whatever they appear to be, are also reached *if it be proved as matter of fact* that they were widely offered or dealt in under terms or courses of dealing which established their character in commerce as "investment contracts" or as "any interest or instrument commonly known as a 'security'." (320 U. S. 351) (EMPHASIS SUPPLIED)

That decision reversed a decision of the Circuit Court of Appeals for the Fifth Circuit, unfavorable to the Commission from which Hutcheson, Circuit Judge, dissented. The opinion in the case at bar was written by Judge Hutcheson and concurred in by the whole Court.

We attribute no great importance to the fact that there are two companies rather than one. Were there no Service Company officered and controlled by the owners and officers of the Howey Company, no doubt some other company not so officered and owned would be rendering similar services. The determinative fact, as we see it, is that the two companies were engaged in the development and marketing of fruit-producing land and not in the uttering and marketing of written obligations.

The meaning and purpose of the "Securities Act of 1933" is not a matter for didactic exposition but is to be found in a reading of the statute to determine whether the transaction before the Court is in substance and practical effect within the scope of the statute.

By reference to the original enactment, Public No. 22, 73rd Congress, H. R. 5480, we find the enactment entitled, "An Act To provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes."

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The Trial Court's Findings of Fact and Conclusions of Law, accompanied by a Memorandum Opinion, appear on pages 94 to 107, inclusive of The Record. The facts and circumstances would admit of no inference that either or both of these Companies engaged in the sale of securities.

The business of the Service Company is a general business of servicing citrus groves and services many grove properties. In March of 1944 it was servicing 2,487.36 acres of citrus groves. It maintains 75 tractors, sprayer wagons, fertilizer trucks and other machinery used in cultivating these citrus groves and a machine shop and force of mechanics, and also maintains a cannery and packing plant and a force of about one man to each one hundred acres. (R. 101-105)

At this point it is pertinent to remark that the modern methods of citrus care have in great part substituted engine driven apparatus for old-time manual care, and this is noted by the District Judge in his

opinion, in which he says: "The Citrus industry is an established industry in central and southern Florida and according to United States Census of 1940 there were 1,721 farms reporting two (2) acres or more of citrus trees in Lake County, with more than one million trees of bearing age. It is a matter of common knowledge in the citrus section of Florida, and the record discloses, that the care of citrus groves requires equipment and a force beyond the means of the owner of a small tract of citrus property and there are numerous companies of good standing in the State, whose business is to service groves owned by others. There are at least seven such companies operating in the area in which the Service Company operates." (R. 105)

To say that the owner had no right to a specific crop of fruit overlooks the fact that in the care of each grove, as in the yield of the fruit, the cost of the care and the proceeds of the fruit may be, and are, definitely and distinctly accounted for with respect to the specific property owned by the individual. (R. 101)

The Howey Company sells to persons who do not use the Service Company as their caretaker and the Service Company services trees on land not purchased from the Howey Company and solicits service contracts from others than purchasers from the Howey Company. Sales of acreage by the Howey Company are not conditioned upon the purchaser's entering into service agreements with the Service Company and the care taking agreements are not conditioned upon the

purchase of acreage from the Howey Company. (R. 100)

Prospective customers have opportunity to learn that there are numerous competing service companies of high standing operating in the vicinity whose business is to service property owned by others. Such competitors post signs by the land serviced by them, which are visible from the highway. (R. 100)

The form of Contract of Sale, Exhibit A to the Stipulation, and the form of Service Contract, Exhibit B to the Stipulation, speak for themselves. (R. 11-20)

The reasoning of the District Judge set forth in his Opinion speaks for itself:

"Plaintiff contends that the activities of the Howey Company and the Service Company in the sale of grove properties and in the care of same, constitute a violation of Section 5(a) of the Securities Act of 1933—15 U. S. C. 77 (a) (e), and by this suit seeks to enjoin such acts and practices. The specific charge is that the entry into service contracts by the Service Company, with purchasers of land from the Howey Company constitutes the sale of securities and as no registration statement, with respect to such activities has been or is now in effect with the Securities and Exchange Commission, that the defendants should be enjoined from continuation of their present practices until registration statements have been filed and approved according to the requirements of the Securities Act of 1933.

"In deciding this case I desire to let the record show

that I adhere to the legal principle and interpretation of the Securities Act, as announced by Judge Strum, in *Securities and Echange Commission vs. Bailey, et al.*, 41 Fed. Supp. 647. I find from the testimony introduced in this case that this case does not fall within the same category as that case and under facts shown by the record in this case, the defendants are not selling securities as that word is defined in the Securities Act and that the Government is not entitled to the relief sought in this particular suit."

After comment on the decision in the *Securities and Exchange Commission vs. Bailey*, 41 Fed. Supp. 647, the Judge continues:

"As pointed out above, the citrus industry is an established industry in Florida. Its beginning antedates the building of railroads in the State and its progress has been such that it is the largest single farming activity in the State today. Moreover, the record in this case shows that not a single sale of citrus grove property was made by the Howey Company during the period involved in this suit, except to purchasers who actually inspected the property before purchasing the same. The record further discloses that no purchaser is required to engage the Service Company to care for his property and that of the fifty-one purchasers acquiring citrus property during this period, only forty-two entered into contracts with the Service Company for the care of the property. The competition between service companies is keen. The services offered by the Howey Company through the Service Company to the purchasers of citrus properties from the Howey Company is more in the nature of a guarantee to such purchasers that their properties will be well cared for, than

anything else. The Service Company could not long exist if it depended altogether upon the business secured from the sales made by the Howey Company. Moreover, the purchasers of these small tracts of citrus property could not safely acquire same unless they did, at the same time, secure the services of some reliable service company to care for their properties. The employment of the Service Company by the purchasers of property from the Howey Company in no way constitutes a violation of the Securities Act of 1933." (R. 103-104)

The Howey Company is not trafficking in options, licenses, or precarious leaseholds. The contract, Exhibit "A", is not a device to attract capital but is an out and out contract for conveyance of described land by a warranty deed conveying merchantable title. Under the laws of Florida upon the execution and delivery of such a contract the vendor becomes the holder of the legal interest in trust for its vendee as security for the deferred purchase price due from the latter to the former. Were the Howey Company and the Service Company identical and the possession retained by it, the sales contract would operate to transfer the equitable title to the purchaser. This is clearly stated in the leading Florida case on this subject: "We do not think that the retention of possession of the land by the vendor . . . makes any material difference in his *status* as owner . . . He had the right to stipulate . . . for the retention of possession until the purchase money was paid, but this did not render the transaction

any the less an unqualified sale of the property on his part • • •"

*Insurance Company of North America vs. Erickson*, 50 Fla. 419 and 428; 39 So. 495 and 498.

*Reed vs. The American Insurance Company of Newark, N. J.*, 128 Fla. 549; 175 So. 224.

The business of the Service Company is in no sense a profit sharing arrangement. Its compensation is rated at so much per acre, per year, according to the age of the trees. Under that arrangement, the owner pays, dollar for dollar, the market price delivered at the described property of pruning, dusting, dusting material, spraying, spraying material, special treatment, seed for cover crop, sowing of same, fertilizer, replacement of any trees which may die, and watering trees when and as performed or applied in accordance with the best judgment of the Service Company—all as set forth in the contract, Exhibit "B". (R. 15)

The Service Company is bound to discharge its obligation diligently and in good faith, and is legally responsible in damages if it fails to do so. (*Griffing Brothers Company vs. Winfield*, 53 Fla. 589; 43 So. 687)

Some point is made of the fact that possession of the premises is granted the Service Company, but its purpose is strictly limited by the Third Clause to the purpose of maintenance of the grove and the payment of the net proceeds from the sale of the fruit, and assures to the owner the fealty of a tenant. (*Griffing Brothers Company vs. Winfield*, 53 Fla. 589; 43 So. 687).

There are a half dozen or more other service companies operating in this area, assuring a standard of efficiency in the care of the groves. (R. 10) Of 195.26

acres sold by the Howey Company during the three-year period ending May 31, 1943, 85% are being cared for by the Service Company; and of a total of 2,487.36 acres of groves under cultivation by the Service Company in March of the present year (1944) more than 1,400 acres were of groves more than ten years old. (R. 10)

In the face of these facts it cannot well be contended that this is an enterprise of exploitation.

Counsel's conception of the business as outlined in the Petition and Brief is not entirely consistent with the record. It is undoubtedly true that Appellees' customers are from all parts of the country and that they do not possess the knowledge, skill, and equipment necessary for the care and cultivation of citrus groves; and that would be true of a great many resident grove owners who employ the services of the numerous concerns owning and operating power-operated spraying, dusting, and cultivating equipment. But it is very doubtful if in any instance the purchaser of an orange grove was solely attracted by the prospect of profit.

In numerous instances the purchasers have acquired homes in the vicinity, or spend a portion of each year in the vicinity, and rely on the Service Company or some other service concern to care for the grove and market the fruit, frequently inquiring and making suggestions both with respect to care of the grove and marketing of the fruit. (R. 9)

The establishment and operation of the hotel or country club may more reasonably be attributed to a purpose to encourage such instances than as an enticement to casual profit seekers.

Since the Fall of 1940, approximately 6,000 people

have stayed at the hotel and between February 1, 1941 and May 31, 1943 the Howey Company made fifty-one sales to forty-two persons involving a total of 195.24 acres for $165,783.

And as to the service companies, the very nature of the employment is such as to make it known to everyone in the neighborhood and any failure to carry on would soon be manifest and subject the contract to termination by the owners.

Respectfully submitted,

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Tavares, Florida;

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Jacksonville, Florida,
*Counsel for Respondents.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 843

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER,
vs.
W. J. HOWEY COMPANY AND HOWEY-IN-THE-HILLS SERVICE, INC.,
RESPONDENTS.

## SUPPLEMENTAL MEMORANDUM IN BEHALF OF RESPONDENTS

Petitioner requested and the trial judge granted a requested finding (No. 16, Findings of Fact R. 85) in these words: "Between February 1, 1941 and May 31, 1943, the Howey Company made 51 sales to 42 persons involving a total of 195.26 acres for $165,788. ($165,783 in the request) Eight of these sales were of non-bearing trees totaling 103.21 acres and 43 were sales of bearing trees totaling 92.05 acres. Of the 42 persons, 31 purchased tracts less than 5 acres. The average holding of these persons is 1.33 acres. All but one of these small purchasers made only a single purchase, whereas the 11 purchasers of more than 5 acres purchased their holdings in 19 transactions. Sales of as little as .65 acre, .7 acre, .73 acre were made by the Howey Company. Of the acreage sold 166.54 acres (85%) are being cared for by the Service Company." (R. 97)

What other holdings these 31 purchasers may have had, or have, does not appear.

It is manifest that purchaser No. 8 made no less than 4 distinct purchases, 4-25-41, 10-21-41, 1-23-42, and 7-1-42; purchaser No. 16 made two purchases, 3-18-42 and 2-14-43; purchaser No. 18 made two purchases on 3-27-42; purchaser No. 26 made two purchases, 4-28-42 and 6-12-42; purchaser No. 28 made two purchases, 4-9-42 and 2-17-43; and purchaser No. 29 made two purchases, 6-9-42 and 5-21-43. (R. 31, 32, 33 and 34.) The 11 persons who purchased 5 acres or more (in 19 transactions) purchased an average of 13.93 acres, and the average of of the 42 purchasers was 4.649 acres.

In this connection it is not insignificant that the United States Census, Defendant's Exhibit "1", (R. 114 and 117) "Citrus Production in Lake County," contains this: "On many farms there are a few fruit or planted nut trees, or grapevines, which are not a part of a well-defined orchard or vineyard. In many such cases reports were secured for the number of trees, with or without production, but no acreage was shown. An acreage was supplied when there were enough trees or plants, at normal planting distances, to make two acres." (R. 117)

Respectfully submitted,

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George C. Bedell,
Jacksonville, Florida,

*Counsel for Respondents.*

# SUPREME COURT OF THE UNITED STATES.

No. 843.—October Term, 1945.

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|---|---|
| Securities and Exchange Commission, Petitioner, vs. W. J. Howey Company and Howey-in-the-Hills Service, Inc. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[May 27, 1946.]

Mr. Justice Murphy delivered the opinion of the Court.

This case involves the application of § 2(1) of the Securities Act of 1933[1] to an offering of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

The Securities and Exchange Commission instituted this action to restrain the respondents from using the mails and instrumentalities of interstate commerce in the offer and sale of unregistered and non-exempt securities in violation of § 5(a) of the Act. The District Court denied the injunction, 60 F. Supp. 440, and the Fifth Circuit Court of Appeals affirmed the judgment, 151 F. 2d 714. We granted certiorari on a petition alleging that the ruling of the Circuit Court of Appeals conflicted with other federal and state decisions and that it introduced a novel and unwarranted test under the statute which the Commission regarded as administratively impractical.

Most of the facts are stipulated. The respondents, W. J. Howey Company and Howey-in-the-Hills Service, Inc., are Florida corporations under direct common control and management. The Howey Company owns large tracts of citrus acreage in Lake County, Florida. During the past several years it has planted about 500 acres annually, keeping half of the groves itself and offering the other half to the public "to help us finance additional development." Howey-in-the-Hills Service, Inc., is a service company engaged in cultivating and developing many of these groves, including the harvesting and marketing of the crops.

[1] 48 Stat. 74, 15 U. S. C. § 77b (1).

Each prospective customer is offered both a land sales contract and a service contract, after having been told that it is not feasible to invest in a grove unless service arrangements are made. While the purchaser is free to make arrangements with other service companies, the superiority of Howey-in-the-Hills Service, Inc., is stressed. Indeed, 85% of the acreage sold during the 3-year period ending May 31, 1943, was covered by service contracts with Howey-in-the-Hills Service, Inc.

The land sales contract with the Howey Company provides for a uniform purchase price per acre or fraction thereof, varying in amount only in accordance with the number of years the particular plot has been planted with citrus trees. Upon full payment of the purchase price the land is conveyed to the purchaser by warranty deed. Purchases are usually made in narrow strips of land arranged so that an acre consists of a row of 48 trees. During the period between February 1, 1941, and May 31, 1943, 31 of the 42 persons making purchases bought less than 5 acres each. The average holding of these 31 persons was 1.33 acres and sales of as little as 0.65, 0.7 and 0.73 of an acre were made. These tracts are not separately fenced and the sole indication of several ownership is found in small land marks intelligible only through a plat book record.

The service contract, generally of a 10-year duration without option of cancellation, gives Howey-in-the-Hills Service, Inc., a leasehold interest and "full and complete" possession of the acreage. For a specified fee plus the cost of labor and materials, the company is given full discretion and authority over the cultivation of the groves and the harvest and marketing of the crops. The company is well established in the citrus business and maintains a large force of skilled personnel and a great deal of equipment, including 75 tractors, sprayer wagons, fertilizer trucks and the like. Without the consent of the company, the land owner or purchaser has no right of entry to market the crop;[2] thus there is ordinarily no right to specific fruit. The company is accountable only for an allocation of the net profits based upon a check made at the time of picking. All the produce is pooled by the respondent companies, which do business under their own names.

[2] Some investors visited their particular plots annually, making suggestions as to care and cultivation, but without any legal rights in the matters.

The purchasers for the most part are non-residents of Florida. They are predominantly business and professional people who lack the knowledge, skill and equipment necessary for the care and cultivation of citrus trees. They are attracted by the expectation of substantial profits. It was represented, for example, that profits during the 1943-1944 season amounted to 20% and that even greater profits might be expected during the 1944-1945 season, although only a 10% annual return was to be expected over a 10-year period. Many of these purchasers are patrons of a resort hotel owned and operated by the Howey Company in a scenic section adjacent to the groves. The hotel's advertising mentions the fine groves in the vicinity and the attention of the patrons is drawn to the groves as they are being escorted about the surrounding countryside. They are told that the groves are for sale; if they indicate an interest in the matter they are then given a sales talk.

It is admitted that the mails and instrumentalities of interstate commerce are used in the sale of the land and service contracts and that no registration statement or letter of notification has ever been filed with the Commission in accordance with the Securities Act of 1933 and the rules and regulations thereunder.

Section 2(1) of the Act defines the term "security" to include the commonly known documents traded for speculation or investment.[3] This definition also includes "securities" of a more variable character, designated by such descriptive terms as "certificate of interest or participation in any profit-sharing agreement," "investment contract" and "in general, any interest or instrument commonly known as a 'security.'" The legal issue in this case turns upon a determination of whether, under the circumstances, the land sales contract, the warranty deed and the service contract together constitute an "investment contract" within the meaning of § 2(1). An affirmative answer brings into operation the registration requirements of § 5(a), unless the security

[3] "The term 'security' means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing."

is granted an exemption under § 3(b). The lower courts, in reaching a negative answer to this problem, treated the contracts and deeds as separate transactions involving no more than an ordinary real estate sale and an agreement by the seller to manage the property for the buyer.

The term "investment contract" is undefined by the Securities Act or by relevant legislative reports. But the term was common in many state "blue sky" laws in existence prior to the adoption of the federal statute and, although the term was also undefined by the state laws, it had been broadly construed by state courts so as to afford the investing public a full measure of protection. Form was disregarded for substance and emphasis was placed upon economic reality. An investment contract thus came to mean a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves.[4]

By including an investment contract within the scope of § 2(1) of the Securities Act, Congress was using a term the meaning of which had been crystallized by this prior judicial interpretation. It is therefore reasonable to attach that meaning to the term as used by Congress, especially since such a definition is consistent with the statutory aims. In other words, an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise. Such a definition necessarily underlies this Court's decision in *S. E. C.* v. *Joiner Corp.*, 320 U. S. 344, and has been enunciated and applied many times by lower federal

[4] State v. Evans, 154 Minn. 95, 191 N. W. 425; Klatt v. Guaranteed Bond Co., 212 Wis. 12, 250 N. W. 825; State v. Heath, 199 N. C. 135, 153 S. E. 855; Prohaska v. Hemmer-Miller Development Co., 256 Ill. App. 331; People v. White, 124 Cal. App. 548, 12 P. 2d 1078; Stevens v. Liberty Packing Corp., 111 N. J. Eq. 61, 161 A. 193. See also Moore v. Stella, 52 Cal. App. 2d 766, 127 P. 2d 300.

courts.[5] It permits the fulfillment of the statutory purpose of compelling full and fair disclosure relative to the issuance of "the many types of instruments that in our commercial world fall within the ordinary concept of a security." H. Rep. No. 85, 73rd Cong., 1st Sess., p. 11. It embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.

The transactions in this case clearly involve investment contracts as so defined. The respondent companies are offering something more than fee simple interests in land, something different from a farm or orchard coupled with management services. They are offering an opportunity to contribute money and to share in the profits of a large citrus fruit enterprise managed and partly owned by respondents. They are offering this opportunity to persons who reside in distant localities and who lack the equipment and experience requisite to the cultivation, harvesting and marketing of the citrus products. Such persons have no desire to occupy the land or to develop it themselves; they are attracted solely by the prospects of a return on their investment. Indeed individual development of the plots of land that are offered and sold would seldom be economically feasible due to their small size. Such tracts gain utility as citrus groves only when cultivated and developed as component parts of a larger area. A common enterprise managed by respondents or third parties with adequate personnel and equipment is therefore essential if the investors are to achieve their paramount aim of a return on their investments. Their respective shares in this enterprise are evidenced by land sales contracts and warranty deeds, which serve as a convenient method of determining the investors' allocable shares of the profits. The resulting transfer of rights in land is purely incidental.

Thus all the elements of a profit-seeking business venture are present here. The investors provide the capital and share in

[5] Atherton v. United States, 128 F. 2d 463; Penfield Company of California v. S. E. C., 143 F. 2d 746; S. E. C. v. Universal Service Association 106 F. 2d 232; S. E. C. v. Crude Oil Corp., 93 F. 2d 844; S. E. C. v. Bailey 41 F. Supp. 647; S. E. C. v. Payne, 35 F. Supp. 873; S. E. C. v. Bourbon Sales Corp., 47 F. Supp. 70; S. E. C. v. Wickham, 12 F. Supp. 245; S. E. C. v. Timetrust, Inc., 28 F. Supp. 34; S. E. C. v. Pyne, 33 F. Supp. 988. The Commission has followed the same definition in its own administrative proceedings. In re Natural Resources Corporation, 8 S. E. C. 635.

the earnings and profits; the promoters manage, control and operate the enterprise. It follows that the arrangements whereby the investors' interests are made manifest involve investment contracts, regardless of the legal terminology in which such contracts are clothed. The investment contracts in this instance take the form of land sales contracts, warranty deeds and service contracts which respondents offer to prospective investors. And respondents' failure to abide by the statutory and administrative rules in making such offerings, even though the failure result from a bona fide mistake as to the law, cannot be sanctioned under the Act.

This conclusion is unaffected by the fact that some purchasers choose not to accept the full offer of an investment contract by declining to enter into a service contract with the respondents. The Securities Act prohibits the offer as well as the sale of unregistered, non-exempt securities.[6] Hence it is enough that the respondents merely offer the essential ingredients of an investment contract.

We reject the suggestion of the Circuit Court of Appeals, 151 F. 2d at 717, that an investment contract is necessarily missing where the enterprise is not speculative or promotional in character and where the tangible interest which is sold has intrinsic value independent of the success of the enterprise as a whole. The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. If that test be satisfied, it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value. See *S. E. C.* v. *Joiner Corp.*, *supra*, 352. The statutory policy of affording broad protection to investors is not to be thwarted by unrealistic and irrelevant formulae.

*Reversed.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[6] The registration requirements of § 5 refer to sales of securities. Section 2(3) defines "sale" to include every "attempt or offer to dispose of, or solicitation of an offer to buy," a security for value.

# SUPREME COURT OF THE UNITED STATES.

No. 843.—October Term, 1945.

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| Securities and Exchange Commission, Petitioner, *vs.* W. J. Howey Company and Howey-in-the-Hills Service, Inc. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit. |

[May 27, 1946.]

Mr. Justice Frankfurter dissenting.

"Investment contract" is not a term of art; it is a conception dependent upon the circumstances of a particular situation. If this case came before us on a finding authorized by Congress that the facts disclosed an "investment contract" within the general scope of § 2(1) of the Securities Act, 48 Stat. 74, 15 U. S. C. § 77b(1), the Securities and Exchange Commission's finding would govern, unless, on the record, it was wholly unsupported. But that is not the case before us. Here the ascertainment of the existence of an "investment contract" had to be made independently by the District Court and it found against its existence. 60 F. Supp. 440. The Circuit Court of Appeals for the Fifth Circuit sustained that finding. 151 F. 2d 714. If respect is to be paid to the wise rule of judicial administration under which this Court does not upset concurrent findings of two lower courts in the ascertainment of facts and the relevant inferences to be drawn from them, this case clearly calls for its application. See *Allen* v. *Trust Company of Georgia*, 327 U. S. —. For the crucial issue in this case turns on whether the contracts for the land and the contracts for the management of the property were in reality separate agreements or merely parts of a single transaction. It is clear from its opinion that the District Court was warranted in its conclusion that the record does not establish the existence of an investment contract:

> ". . . the record in this case shows that not a single sale of citrus grove property was made by the Howey Company during the period involved in this suit, except to purchasers who actually inspected the property before purchasing the same. The record further discloses that no purchaser is re-

quired to engage the Service Company to care for his property and that of the fifty-one purchasers acquiring property during this period, only forty-two entered into contracts with the Service Company for the care of the property." 60 F. Supp. at 442.

Simply because other arangements may have the appearances of this transaction but are employed as an evasion of the Securities Act does not mean that the present contracts were evasive. I find nothing in the Securities Act to indicate that Congress meant to bring every innocent transaction within the scope of the Act simply because a perversion of them is covered by the Act.